COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1187 **Cir. Ct. No. 2013CV176**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOLENE ZABLER AND GARY ZABLER,

PLAINTIFFS-RESPONDENTS,

V.

KEVIN J. WEBER, M.D. AND PROASSURANCE CASUALTY COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Dr. Kevin Weber and his insurer Proassurance Casualty Company (collectively, Proassurance Casualty), appeal a money judgment in favor of Jolene Zabler and Jolene's father, Gary Zabler. Proassurance Casualty contends that the circuit court erred by: (1) failing to properly instruct

the jury; (2) permitting the Zablers' expert witness to testify regarding the witness's examination of Jolene the day before the witness testified; (3) denying Proassurance Casualty's motion for a new trial based on its assertion that the jury's verdict was contrary to the great weight of the evidence; (4) permitting the Zablers' expert witness to testify as to Jolene's future medical expenses; and (5) denying its motion for judgment notwithstanding the jury's verdict on the Zablers' informed consent claim. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In April 2010, Dr. Weber performed surgery on Jolene's right knee. At the time, Jolene was fifteen years old. To manage Jolene's pain, Dr. Weber placed a intra-articular pain pump into Jolene's knee joint space, which allowed the continuous infusion of bupivacaine, a medication for pain, into Jolene's knee joint (the patella-femoral compartment) for approximately two days.

¶3 In April 2012, Jolene sought medical care from Dr. Christopher Dale, after she felt a "popping" sensation and pain in her right knee. Dr. Dale performed an arthroscopy and found a loss of cartilage between Jolene's right knee cap and femur, which is medically known as chondrolysis. Jolene continued to suffer persistent knee pain. Dr. Dale recommended that Jolene undergo a cartilage transplant. Dr. Dale performed a cartilage implant surgery on Jolene's right knee in late December 2012.

¶4 In May 2013, Jolene and Gary brought suit against Proassurance Casualty alleging causes of action against Dr. Weber for negligence in his treatment of Jolene and inadequate informed consent, both of which related to Dr. Weber's use of the pain pump following Jolene's knee surgery. The Zablers alleged that Dr. Weber's use of the pain pump following Jolene's April 2010 knee

surgery was a substantial factor in causing Jolene's cartilage damage and that Dr. Weber was negligent in using it. The Zablers also alleged that Dr. Weber had failed to inform them of the risks of the pain pump, as required under WIS. STAT. § 448.30 (2015-16).[1]

¶5 A jury returned a verdict in favor of Proassurance Casualty on the Zablers' negligence claim, and a verdict in favor of the Zablers on the Zablers' informed consent claim. Pursuant to WIS. STAT. § 805.14, Proassurance Casualty moved for judgment notwithstanding the jury's verdict and, in the alternative, a new trial on the informed consent claim. The circuit court denied the motion without explanation and a money judgment was entered in favor of the Zablers. Proassurance Casualty appeals. Additional facts are discussed below.

DISCUSSION

¶6 Proassurance Casualty contends that it is entitled to a new trial on the Zablers' informed consent claim because: (1) the circuit court erred in failing to include the "extremely remote possibility" exception when the court instructed the jury on Dr. Weber's duty to inform the Zablers about the benefits and risks of the use of the pain pump to manage Jolene's pain following her knee surgery; (2) the court erred in allowing the Zablers' expert medical witness to examine Jolene the night before the witness testified at trial; (3) the jury's verdict was contrary to the great weight of the evidence; and (4) the court erred in allowing the Zablers' expert witness to testify as to Jolene's future medical expenses without proper foundation for the expert's opinion. Proassurance Casualty also contends that this

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

court should enter a judgment notwithstanding the jury's verdict on the Zablers' informed consent claim. For the reasons discussed below, we affirm.

A. Instruction on the Extremely Remote Possibility Exception to Informed Consent

¶7 Proassurance Casualty contends that the circuit court erred in failing to instruct the jury on the extremely remote possibility exception to informed consent. *See* WIS. STAT. § 448.30(4).[2]

[2] WISCONSIN STAT. § 448.30 provides:

> Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. The physician's duty to inform the patient under this section does not require disclosure of:
>
> (2) Detailed technical information that in all probability a patient would not understand.
>
> (3) Risks apparent or known to the patient.
>
> (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> (5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
>
> (6) Information in cases where the patient is incapable of consenting.
>
> (7) Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

¶8 A circuit court "has broad discretion in deciding whether to give a particular jury instruction." ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. On appeal, we will reverse and order a new trial "[o]nly if the jury instruction, as a whole, misled the jury or communicated an incorrect statement of law…." ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. When, as here, a jury instruction is challenged as not completely or accurately informing the jury of the law applicable to the facts, an appellate court is presented with a question of law that is reviewed independently of the circuit court. ***State v. Gonzalez***, 2011 WI 63, ¶22, 335 Wis. 2d 270, 802 N.W.2d 454.

¶9 Under WIS. STAT. § 448.30, Wisconsin's informed consent statute, "[a]ny physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments." There are exceptions to this rule. *See* § 448.30(2) - (7). One exception provides that a physician is not required to disclose to his or her patient "[e]xtremely remote possibilities that might falsely or detrimentally alarm the patient." Sec. 448.30(4).

¶10 At trial, Proassurance Casualty submitted a proposed jury instruction on informed consent, which included the following language on the extremely remote possibility exception: "A physician's duty to inform [his or her] patient does not require disclosure of … [e]xtremely remote possibilities that might falsely or detrimentally alarm the patient." *See* WIS JI–CIVIL 1023.2. The circuit court declined to include this language in the instruction.

¶11 On appeal, Proassurance Casualty argues that the circuit court erred in refusing to instruct the jury on the extremely remote possibility exception because "substantial evidence" was presented that at the time of Jolene's surgery,

chondrolysis in the knee following the use of a pain pump in a knee joint was an extremely remote possibility. In support, Proassurance points to the following evidence presented at trial: (1) the first published article linking chondrolysis in a knee with the use of a pain pump in the knee joint was published ten months prior to Jolene's surgery and prior to that, all medical literature linking chondrolysis with pain pump usage concerned shoulders; (2) at the time of Jolene's surgery, there were only three or four reported cases of chondrolysis in the knee; (3) Dr. Weber testified that at the time of Jolene's surgery, he was not aware of the correlation between chondrolysis in the knee and the use of pain pumps in the knee joint; (4) the Zablers' expert witness, Dr. Peter Wernicki, testified that at the time of Jolene's surgery, the majority of medical literature connecting chondrolysis with the use of pain pumps concerned the shoulder; and (5) two orthopedic surgeons who testified on behalf of Proassurance Casualty each testified that at the time of Jolene's surgery, there was little information in the orthopedic community concerning the relationship between the use of a pain pump and chondrolysis in the knee.

¶12 We are not persuaded that the jury should have been instructed on the extremely remote possibility exception. Proassurance Casualty points to the limited medical literature on the association between chondrolysis in the knee and the administering of bupivacaine into a knee joint by pain pump, and Dr. Weber's lack of knowledge at the time of Jolene's surgery of that risk. However, that is not evidence that there is an extremely remote possibility that chondrolysis in the knee will result from the use of a pain pump; rather, it relates to what a reasonable, well-qualified physician in Dr. Weber's position would have known at the time of

Jolene's surgery. That is a separate, and distinct, limitation on a physician's informed consent obligation, and the jury was instructed on that limitation.[3]

¶13 Proassurance does not point to any evidence in the record showing how often chondrolysis is likely to occur in the knee following the administration of bupivacaine with a pain pump. *Compare* ***Martin v. Wisconsin Health Care Liab. Ins. Plan***, 192 Wis. 2d 156, 167-68, 531 N.W.2d 70 (1995) (concluding that a one to three percent possibility was not remote in light of the potentially severe consequences). Without any such evidence, there can be no determination that the likelihood that chondrolysis will occur in the knee following the use of a pain pump administering bupivacaine in the knee joint is extremely remote. Accordingly, we conclude that Proassurance Casualty has not shown that an extremely remote possibility instruction was required in this case.

B. Expert Medical Witness Testimony Regarding His Examination of Jolene

¶14 Proassurance Casualty contends that the circuit court erred when it permitted the Zablers' medical expert witness, Dr. Wernicki, to testify regarding his examination of Jolene the night before he testified at trial.[4] A circuit court's evidentiary rulings are discretionary. ***State v. Wollman***, 86 Wis. 2d 459, 464, 273

[3] The jury was instructed that Dr. Weber's obligations under Wisconsin's informed consent law did not include: "information beyond what a reasonably, well-qualified physician in a similar medical classification would know."

[4] Proassurance Casualty also asserts that the circuit court "erred in allowing [Dr. Wernicki] to examine Jolene [] the night before his testimony at trial," but does not develop an argument in support of this assertion. Therefore, to the extent that this is a separate issue from whether Dr. Wernicki should have been allowed to testify regarding that examination, we consider the issue abandoned.

N.W.2d 225 (1979). We will uphold a circuit court's discretionary decision "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶15 Prior to trial, the Zablers' trial counsel notified Proassurance Casualty that Dr. Wernicki would be providing rebuttal testimony "to some of the unexpected and creative opinions" of Proassurance Casualty's two expert witnesses, in particular an opinion by one expert that Jolene's knee condition could be caused by an abnormally high Q angle,[5] and that Dr. Wernicki would "likely [perform] …. a short in[-]person exam" of Jolene prior to trial. Proassurance Casualty moved the circuit court in limine to bar Dr. Wernicki from examining Jolene and testifying regarding that examination. Proassurance Casualty argued that it could "only assume [from Dr. Wernicki's examination of Jolene] that Dr. Wernicki will now be offering new prognosis opinions, which would be unduly prejudicial to [Proassurance Casualty] in being able to prepare for [its] trial defense … [and] would [] be impermissible rebuttal opinions as Dr. Wernicki had the opportunity initially to give prognostic opinions … and did not." At the hearing on its motion, Proassurance Casualty also argued that Dr. Wernicki's examination of Jolene might result in prejudicial surprise to it because Dr. Wernicki might form new opinions.

[5] At trial, Dr. Wernicki described the Q angle as "the angle where the leg comes down, then the knee cap patella tendon at the bottom of it attaches to the tibia or the leg below…. If it is significantly large, sometimes it can lead to the knee cap not gliding right in that groove and maybe being off to the side or maybe tilting a bit, it's pulling to one side."

¶16 The circuit court determined that Dr. Wernicki would be permitted to examine Jolene; however, the court limited Dr. Wernicki's testimony regarding the examination. The court stated that Dr. Wernicki would not be permitted "to testify about any opinion that [a defense expert] hasn't already testified about. If [Dr. Wernicki's] examination confirms an opinion that he has already expressed, he can do so … if his examination is inconsistent with what he previously opined because the knee is in better condition than he thought it would be, [the Zablers' trial counsel has] … to provide that immediately to the defense."

¶17 Relevant here is the following testimony by Dr. Wernicki, which Proassurance Casualty cites to this court in its brief-in-chief:

> [Zablers' trial counsel] You have seen that … one of the defense experts[] has opined that the Q angle of 15 degrees is a potential cause of [Jolene's] cartilage injury?
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> [Dr. Wernicki] I see where he opined that.
>
> [Zablers' trial counsel] What is your comment on that?
>
> [Dr. Wernicki] Well, first of all, in a female a Q angle of 15 is absolutely normal.
>
> [Zablers' trial counsel] Are you aware of literature that supports that view?
>
> [Dr. Wernicki] Yeah. There was a study in the journal called Physical Therapy I believe in 1989 … it surveyed Q angles in a number of people, fairly large number and measured them and averaged them. I believe the average Q angle in a woman is 15.6 or so and in a male I think it's closer to 11, but 15 is right smack in the middle of normal.
>
> [Zablers' trial counsel] Have you had the opportunity to evaluate [Jolene's] Q angle?
>
> [Dr. Wernicki] Yes. I measured it and hers is by my reading [] 14. And 14 or 15 is within the deviation. It's not that accurate a measurement.

> [Zablers' trial counsel] Do you have any opinion as to whether an abnormal Q angle is a likely cause of [Jolene's] cartilage loss?
>
> [Dr. Wernicki] Well, first of all, she doesn't have an abnormal Q angle so I do not believe it's a likely cause…. So I see no reason why that would lead to chondrolysis.
>
> ….
>
> [Zablers' trial counsel] When you examined [Jolene] yesterday and estimated her Q angle, did you also have the opportunity to check for any objective signs of problems with the knee?
>
> [Dr. Wernicki] Well, she has tenderness about her kneecap and to a lessor extent about her trochlea area. She has crepitus which is kind of a catching, crunching when she moves her knee up and down.
>
> She has a positive compression test which is when you push on the kneecap and force those surfaces together, it hurts her, and then there is one where you do that when she is actually tightening her leg. And she jumped before I could even do it because she knew it was going to hurt her.
>
> So she has all the signs of patella-femoral or knee cap and femur discomfort in there.

¶18 WISCONSIN STAT. § 904.03 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence that is a surprise to the opposing party is not specifically identified in § 904.03 as a ground for excluding evidence. However, in ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 211 Wis. 2d 296, 303, 564 N.W.2d 766 (1997), our supreme court stated that "a witness whose testimony results in surprise to opposing counsel may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues."

¶19 As best we can tell, Proassurance Casualty is asserting that Dr. Wernicki's testimony regarding his examination of Jolene should have been excluded because: (1) his findings regarding Jolene's Q angle and her current condition were a surprise to Proassurance Casualty; and (2) Proassurance Casualty was prejudiced because it was not afforded an opportunity to review or to submit Dr. Wernicki's findings as to Jolene's condition to its own experts before Dr. Wernicki testified or to properly prepare for cross-examination of Dr. Wernicki. We are not persuaded.

¶20 With regard to Dr. Wernicki's testimony regarding Jolene's Q-angle, the circuit court permitted Dr. Wernicki to examine Jolene to rebut an opinion by a defense expert, Dr. Richard Glad, that Jolene's chondrolysis was caused by an atypical Q-angle. Dr. Glad testified on cross-examination that he had previously opined that the normal Q angle for a female is 7 degrees, and Jolene's Q angle of 15 degrees was a possible cause of her chondrolysis. Dr. Glad admitted on cross-examination that, since giving that opinion, he had conducted additional research and at the time of trial "underst[oo]d [that] 15 degrees is [a] normal Q angle for a female." We will assume for the sake of argument that Proassurance Casualty was surprised that Dr. Wernicki would testify that Jolene had a Q angle of 15 degrees, which was normal for a female. We conclude, however, that Proassurance Casualty was not prejudiced by that testimony because its own expert witness admitted at trial that Jolene's Q angle was within the normal range for a female.

¶21 With regard to Dr. Wernicki's testimony as to Jolene's condition at the time of trial, the circuit court ruled that Dr. Wernicki could only testify in a manner that was consistent with his previously disclosed opinions. No new opinions could be offered by Dr. Wernicki. The court also ruled that if Dr. Wernicki's examination revealed that Jolene's condition had improved from the

time of his previous assessment of Jolene, the Zablers were obligated to inform Proassurance Casualty of Dr. Wernicki's findings and Proassurance Casualty would be given time to determine how to address that information at trial.

¶22 Proassurance Casualty does not point to any testimony by Dr. Wernicki that Jolene's condition had deteriorated or had improved from his previous assessment. Accordingly, we conclude that Proassurance Casualty has failed to establish that it was surprised or prejudiced by any testimony as to her current condition.

C. Evidence Supporting the Jury's Verdict on Informed Consent

¶23 Proassurance Casualty contends the circuit court should have granted its motion for a new trial on the Zablers' informed consent claim because the jury's verdict is contrary to the great weight and clear preponderance of the evidence. We are not convinced.

¶24 A circuit court may grant a new trial under WIS. STAT. § 805.15(1) if a jury's verdict is contrary to the great weight and clear preponderance of the evidence. A circuit court's decision denying a new trial under § 805.15(1) is given great deference because that court is in the best position to observe and evaluate the evidence. *See* ***Sievert v. American Family Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). We review the court's decision under the erroneous exercise of discretion standard. ***Id.*** We will uphold the court's decisions "unless it can be said that no reasonable [trier of fact], acting on the same facts and underlying law, could reach the same conclusion," ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶25 Proassurance Casualty argues that the jury's verdict was against the great weight of the evidence because the evidence at trial "established that the risk of chondrolysis in a knee following the use of a pain pump in 2010 was extremely remote," and that only a few individuals in the medical field knew of this remote possibility.

¶26 As we have already demonstrated in the context of rejecting Proassurance Casualty's complaint about the lack of a remote possibility instruction, Proassurance Casualty does not direct this court to any evidence, let alone substantial evidence, that the likelihood of chondrolysis in the knee at the time of Jolene's surgery was remote. As to what Dr. Weber should have known, Proassurance Casualty, as noted above, points to evidence that there "weren't any large studies of chondrolysis in the knee" at the time of Jolene's surgery, and that Dr. Wernicki and Dr. Weber were not aware of medical literature or scientific evidence at the time of Jolene's surgery linking chondrolysis in the knee with the use of a bupivacaine in intra-articular pain pumps. Proassurance Casualty also points to the testimony of their expert witnesses that at the time of Jolene's surgery, "it was common practice" to use pain pumps in the knee, and at that time, there were only three to four *reported* cases of chondrolysis in the knee.

¶27 At trial, evidence was presented that bupivacaine, the medication continuously infused into Jolene's knee, was toxic to chondrocytes, which are cells that "maintain [] an area in the cartilage matrix" and which are found in both knee and shoulder joints. Dr. Weber testified that chondrocytes in the shoulder and knee are the same, that at the time of Jolene's surgery, literature on the toxicity of bupivacaine to chondrocytes did not distinguish between the shoulder and the knee, and Dr. Weber agreed that scientific studies on the toxicity of bupivacaine are equally applicable to the shoulder and knee. Dr. Weber also

testified, as did another expert witness for Proassurance Casualty, that it is a logical assumption that the process of chondrolysis in the shoulder is the same as the process of chondrolysis in the knee.

¶28 Based upon the testimony linking the toxicity of bupivacaine to chondrocytes in the shoulder to the same process in the knee, a reasonable jury could conclude that a reasonable physician in Dr. Weber's position would have known that the infusion of bupivacaine through a pain pump in a shoulder is associated with chondrolysis and that the infusion of bupivacaine in the knee through a pain pump could have similar consequences. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion when it denied Proassurance Casualty's motion for a new trial.

D. Evidence on Future Medical Expenses

¶29 Restated, Proassurance Casualty contends that the jury's award for future medical expenses is not supported by admissible evidence and even if it was, that the evidence was not sufficient to support the amount of jury's award.

¶30 In order to sustain a jury's verdict on future health care expenses, the following two criteria must be met: (1) there must be expert testimony on permanent injuries that will require future medical treatment and expenses; and (2) an expert must establish the cost of future medical expenses. ***Weber v. White***, 2004 WI 63, ¶20, 272 Wis. 2d 121, 681 N.W.2d 137. The decision to admit or reject the testimony of an expert witness is a matter of discretion for the circuit court. ***Carstensen v. Faber***, 17 Wis. 2d 242, 248, 116 N.W.2d 161 (1962).

¶31 Prior to trial, Proassurance Casualty moved in limine to exclude Dr. Wernicki's testimony as to Jolene's future medical needs. Based on Dr.

Wernicki's deposition testimony that he had not examined Jolene and that he did not know what Jolene's current medical condition was, Proassurance Casualty argued that Dr. Wernicki "cannot give an accurate prognosis of how [Jolene's] knee will do in the future, and/or what kind of medical procedures she may need." Proassurance Casualty argued that any testimony by Dr. Wernicki as to Jolene's future medical care is speculative. Thereafter at trial, Proassurance Casualty objected to Dr. Wernicki's testimony as to the cost of Jolene's future medical needs. Proassurance Casualty argued that Dr. Wernicki's testimony lacked foundation because Dr. Wernicki would be testifying that Jolene would need a knee replacement, but Dr. Wernicki does not perform that surgery, and there was no evidence that Dr. Wernicki would know what that surgery costs, and how much of the cost of the surgery insurance would cover. Ultimately, the court allowed Dr. Wernicki to testify as to both Jolene's future medical care needs and the cost of that care.

¶32 At trial, Dr. Wernicki testified that he is a board certified orthopedic surgeon with his own orthopedic practice in Florida where he specializes in general orthopedics with a focus in sports medicine and arthroscopy. Dr. Wernicki testified that he had reviewed all of the notes of Jolene's treating physicians and the imagings of her knee, including x-rays, MRIs, and intraoperative photographs. Dr. Wernicki testified that images of Jolene's knee prior to her 2010 surgery with Dr. Weber showed a normal looking view of Jolene's knee joint, but that images taken prior to her 2012 surgery with Dr. Dale showed that her trochlea was "rough and irregular … it's got a big divot out of it … we see big pot holes in there and even … exposed bone." Dr. Wernicki testified that Jolene's knee "looks nothing like before" her surgery with Dr. Weber

and that in the image of her knee prior to her 2012 surgery, her "cartilage is devastated."

¶33 With regard to whether Jolene would have future medical needs, Dr. Wernicki testified that there was "extensive damage and loss of cartilage" in Jolene's knee and that the cartilage is never going to come back. Dr. Wernicki testified that although cartilage had been transplanted into her knee, it was transplanted in only a small area and the transplanted cartilage would never "produce normal cartilage." Dr. Wernicki testified that medical literature had shown that Jolene's lack of cartilage would "go downhill. It's worn, it's irregular, it's going to keep wearing, it's going to keep getting irregular and … ultimately … she is going to need a knee replacement," and that in light of her age and the life expectancy of a knee replacement, she would most likely need two knee replacements.

¶34 As to the cost of Jolene's future medical expenses, Dr. Wernicki testified that although he has previously performed total knee replacements, he was not currently performing that surgery, and that he referred patients in need of a total knee replacement to his partner in his medical practice. Dr. Wernicki testified that his patients "frequently" ask about the "ball park" cost of a total knee replacement and that "at various times," including within the year prior to his testimony, he had asked his office staff what a total knee replacement costs.

¶35 Dr. Wernicki testified that in the future, Jolene would likely require two knee replacement surgeries, as well as "additional conservative treatment, probably therapy, injections from time to time, braces, … [and] doctors visits," the cost of which "would be well in excess of $100,000." With regard to the total knee replacements, Dr. Wernicki testified that the first surgery would cost in the

range of $40,000-50,000, and that the second could be more expensive because it would be a revision surgery, which is sometimes more expensive.

¶36 Proassurance Casualty argues that Dr. Wernicki's testimony that Jolene will need a knee replacement, possibly two, in the future was inadmissible because it lacked a sufficient foundation. More specifically, Proassurance Casualty argues that Dr. Wernicki did not have sufficient information on Jolene's medical condition or the needed treatment because he had not examined Jolene and he was not performing knee replacement surgeries as part of his medical practice at the time of trial. We reject Proassurance Casualty's argument that Dr. Wernicki's testimony in this regard was inadmissible.

¶37 Dr. Wernicki testified that he is a board certified orthopedic surgeon with extensive credentials in orthopedic surgery. Dr. Wernicki testified that he had reviewed all of the notes of Jolene's treating physicians and the imagings of her knee, and that his opinion that she will likely need one or two knee replacements in the future was based on the destruction of cartilage he observed in the images and his experience that injuries such as Jolene's do not improve over time. We conclude that there was sufficient foundation for Dr. Wernicki's testimony.

¶38 Proassurance Casualty argues that Dr. Wernicki's testimony on the amount of Jolene's future medical expenses should have been excluded because it lacked foundation. Proassurance Casualty asserts that when Dr. Wernicki testified, Dr. Wernicki had not performed a knee replacement surgery in recent years and Dr. Wernicki "had not personally investigated the cost of knee replacement surgery in Wisconsin." We are not persuaded.

¶39 In general, a witness is not competent to testify as to a matter unless evidence has been introduced that is sufficient to support a finding that the witness has personal knowledge of the matter. *See* WIS. STAT. § 906.02.

¶40 In this case, Dr. Wernicki's testimony established his personal knowledge of the cost of a total knee replacement based on the cost of that procedure when performed by other doctors at his medical practice. Dr. Wernicki testified that his medical partner performs total knee replacements and that he checks with the staff in their office to ascertain the cost of the procedure because his own patients will "frequently" inquire as to the cost. Proassurance Casualty does not explain why source of knowledge is less reliable than testimony from a doctor who actually performs such procedures and then asks staff what the procedure is billed at. There was no evidence that only a doctor actually performing a procedure knows the cost of such a procedure.

¶41 Proassurance Casualty seems to suggest that the cost evidence was inadmissible because it was based on Florida information. But Proassurance Casualty does not explain why the cost of the procedure in Florida is not indicative of the cost in Wisconsin. Perhaps more to the point, Proassurance Casualty did not present evidence that the cost of this procedure varies significantly from state to state, or region to region, or even from one medical facility to another. At best, the concern Proassurance Casualty raises goes to the weight of the evidence, not its admissibility.

¶42 Finally, Proassurance Casualty argues that even if Dr. Wernicki's testimony was admissible, the evidence at trial was insufficient to sustain the jury's verdict for future medical expenses. The jury awarded Jolene $190,000 future medical expenses. Proassurance Casualty argues that Dr. Wernicki

estimated that Jolene's medical expenses would be $100,000 and that "[t]here [is] undeniably no evidentiary support for any recovery in excess" of that amount.

¶43 In a tort case damages are impossible to determine with precision and, therefore, need only be proved with reasonable, not absolute certainty. ***D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson Marine, LLC***, 2008 WI 126, ¶¶63-64, 314 Wis. 2d 560, 757 N.W.2d 803. An award of damages is an issue that rests largely within the discretion of the jury, and "is to be upset only where it is so excessive as to indicate that it resulted from passion, prejudice, or corruption, or a disregard of the evidence or applicable rules of law." ***Staskal v. Symons Corp.***, 2005 WI App 216, ¶38, 287 Wis. 2d 511, 706 N.W.2d 311. When reviewing a challenge of a damage award as excessive, we view the evidence in the light most favorable to the jury's verdict. ***Id.***, ¶39. "This means that if there is any credible evidence under any reasonable view that supports the jury's finding on the amount of damages, the court is to affirm it." ***Id.*** Credible evidence is that evidence which excludes speculation or conjecture. ***Grand View Windows, Inc. v. Brandt***, 2013 WI App 95, ¶22, 349 Wis. 2d 759, 837 N.W.2d 611.

¶44 Dr. Wernicki did not testify, as Proassurance Casualty suggests, that he estimated Jolene's future medical costs to be $100,000. Rather, he testified that he expected her medical expenses to be "well in excess of $100,000." Dr. Wernicki testified that Jolene, who was only twenty-one at the time of trial, was likely going to require two knee replacements at unspecified times in the future, which at the current time cost between $40,000 and $50,000 at his medical practice. In addition, Dr. Wernicki testified that Jolene is likely going to need other treatment throughout her life, including therapy, injections, braces, and doctors visits. The jury was instructed that Jolene's life expectancy is an additional 61.9 years, meaning she can expect to need additional medical care for

her knee for the next 61.9 years. It is reasonable to assume that over that time, the costs of medical care will increase, meaning a surgery that currently costs $40,000 will cost more in the future. We are not persuaded that a damage award of 190,000 in this case is "so excessive as to indicate that it resulted from passion, prejudice, or corruption, or a disregard of the evidence or applicable rules of law." ***Staskal*** 287 Wis. 2d 511, ¶38.

E. Judgment Notwithstanding the Verdict

¶45 Proassurance Casualty contends that the circuit court erred in denying its motion for judgment notwithstanding the verdict on the Zablers' informed consent claim.

¶46 "We review a [circuit] court's denial of a motion for judgment notwithstanding the verdict de novo." ***Hicks v. Nunnery***, 2002 WI App 87,¶15, 253 Wis. 2d 721, 643 N.W.2d 809. "A motion for judgment notwithstanding the verdict accepts the findings of the verdict as true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury." ***Id.*** "The motion does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law." ***Id.*** "In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the jury's verdict, and we sustain the jury's verdict if there is any credible evidence to support it." ***K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc***., 2006 WI App 148, ¶46, 295 Wis. 2d 298, 720 N.W.2d 507.

¶47 Proassurance Casualty argues that Dr. Weber was not required to inform the Zablers of the risk of chondrolysis in the knee from the use of a pain

pump because the evidence establishes that Dr. Weber had no reason to know of that risk and that it is an extremely remote possibility.

¶48 As we explained above in ¶¶12-13, the evidence does not establish that the risk of chondrolysis in the knee is extremely remote. In addition, as explained above in ¶¶26-28, the evidence, when viewed in the light most favorable to the jury's verdict, also establishes that a reasonable physician in Dr. Weber's position would have known that the infusion of bupivacaine through a pain pump in a shoulder is associated with chondrolysis, and that the infusion of bupivacaine in the knee through a pain pump could have similar consequences. Because there is credible evidence to support the jury's verdict, we conclude that the circuit court did not err in denying Proassurance Casualty's motion for judgment notwithstanding the verdict.

CONCLUSION

¶49 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).